United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1260

To be argued by
GERALD L. SHARGEL

B
P/S

IN THE

United States Court of Appeals

For the Second Circuit

No. 76-1260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

SEYMOUR ROSENWASSER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
522 Fifth Avenue
New York, New York 10036
212/687-4100

GERALD L. SHARGEL
Of Counsel

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D.)

TABLE OF CASES

TABLE OF CASES (CONT'D.)

TABLE OF CASES (CONT'D.)

OTHER CITES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SEYMOUR ROSENWASSER,

Defendant-Appellant.

BRIEF FOR APPELLANT SEYMOUR ROSENWASSER

Preliminary Statement

The Appellant Seymour Rosenwasser appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York, adjudging him guilty of one count of violating Title 18, United States Code, Section 659. As a result of this conviction, Appellant was sentenced to the custody of the Attorney General or his duly authorized representative for a period of two (2) years pursuant to the

provisions of Title 18, United States Code, Section 4205(b)(2). In addition, Appellant was fined in the amount of $5,000. Appellant is presently at liberty on bail pending appeal.

The indictment appears on page 6 of Appellant's Appendix.

STATEMENT OF THE FACTS

On March 3rd, 1972, a truck containing women's knit tops, valued at approximately $28,000, was hijacked in New York City. (T 333 - 334)[1/] The stolen shipment was travelling in interstate commerce. (T 267 - 268) In this two-count indictment, Appellant Seymour Rosenwasser was charged with having purchased a portion of this stolen shipment knowing that the goods had been stolen.[2/]

[1/] The letter "T" refers to the trial transcript while the letter "A" introduces reference to Appellant's Appendix.

[2/] Appellant was convicted on Count One of the indictment which charged a substantive violation of Section 659. He was acquitted on Count Two which charged a conspiracy to violate Section 659. (T 664) Co-defendant Allicino was convicted on both counts. Allicino was sentenced to six months' imprisonment and placed on probation for two and one-half years. By stipulation, Allicino has withdrawn his Notice of Appeal.

The Government's principal witness at trial was Paul Fleischer, a professional hijacker who admitted to stealing the goods involved in this case. (T 40) Fleischer described the organization of his hijacking crew and meetings which preceded the theft of the Arline Knitwear truck. As stated, the actual hijacking occurred on March 3rd, 1972. The original plan was to take the truck to a "drop" in New Jersey. (T 59 - 60) This plan, however, was thwarted by weather conditions and the hopeless frustration of New York City traffic.[3/] (T 67 - 68) An alternate plan was devised whereby the stolen truck was unloaded at a garage on 19th Street in Manhattan. (T 68)

Eventually, the hijackers' attention turned to finding a buyer for the stolen merchandise. (T 82) This is where the defendant Gerald Allicino enters the narrative. (T 82 - 83) Fleischer testified that he and other members of his crew met with Allicino and discussed the sale of the hijacked garments. (T 83 - 84) Allicino, according to Fleischer, agreed to take the entire load (T 85) despite the fact that he had specifically been told that the merchandise had been stolen.

[3/] Fleischer testified that it took the robbers one hour to cross the Williamsburg Bridge. (T 67)

(T 86 - 87) The robbers and Allicino finally agreed that Allicino would receive delivery of the goods on the following Monday, March 6th, 1972. (T 87)

At the appointed time, Fleischer and four of his companions transferred the goods from the garage on 19th Street to a garment factory on Pacific Street in Brooklyn. (T 93 - 94) Appellant Seymour Rosenwasser was one of several tenants in this building, occupying some 5,000 square feet of loft space for the business of assembling women's garments. (T 405) Rosenwasser's business, on March 6th, 1972, employed some 22 sewing machine operators. (T 411) Gerald Allicino's brother was the elevator operator in the building. (T 404)

Paul Fleischer testified that when he arrived at the Pacific Street building, he met Gerald Allicino and was then introduced to his brother, the elevator operator. (T 95) The conspirators immediately began unloading the truck and placed the garments on the elevator, which took the goods one flight up. (T 96) According to Fleischer, the stolen goods were taken from the elevator and placed in a shop. It was here that Fleischer, according to his testimony, met Appellant Rosenwasser who was introduced by Allicino as his partner. (T 99)

The witness then testified that after the goods had

been taken into Rosenwasser's shop, the Appellant said he didn't want them. (T 101) Apparently exacerbated by this rejection after hours of hard work, one of the hijackers hurled an ethnic slur and threatened to kill Rosenwasser if he refused to take the load. (T 101) Mediating the dispute, Allicino agreed to purchase one-third of the load and store the remainder until it was sold. (T 101 - 102) A price of $2,300 for the one-third portion was agreed upon by all and the hijackers left. (T 104)

Fleischer's testimony then turned to the hijackers' effort to sell the remainder of the load. (T 106 - 107) Later that evening, Allicino met with Fleischer and paid the $2,300. (T 109 - 110) Finally, the remainder of the goods were sold by Fleischer to a man by the name of Braverman who purchased the balance for $7,700. (T 125)

Richard Redman, an F.B.I. agent, corroborated portions of Fleischer's testimony. (A 10) There was, however, no corroboration whatsoever concerning Rosenwasser's alleged participation. Redman testified that he had recovered seven cartons of the stolen goods at Braverman's house. (A 20 - 21) The agent also recovered the hijacked truck exactly where and in the

condition which Fleischer said he left it. (A 13 - 16)

THE DEFENSE CASE

Appellant Seymour Rosenwasser, testifying on his own behalf, flatly denied knowing Paul Fleischer, let alone having bought stolen goods from him. (A 53 - 54) On the Government's direct case, Fleischer gave a detailed description of the loft in which the stolen goods were placed. (T 93 - 98) Rosenwasser's description of the premises, on the other hand, contradicted the description furnished by Fleischer. (A 55 - 62) Four employees of Rosenwasser, who worked for him in March of 1972, testified that they never observed an incident such as that described by Fleischer. (T 348 - 352, 358 - 363, 373 - 377, 378 - 383) It was then stipulated that if "approximately another fifteen or twenty employees" of the factory were called, they would testify in a similar manner. (T 390) In addition, Gerald Postiglione testified as to Mr. Rosenwasser's reputation for truthfulness and honesty. (T 391) The defendant Allicino did not put in any evidence on his own behalf. (T 398)

STATUTES INVOLVED

Title 18, United States Code, Section 659, states in pertinent part:

> § 659. Interstate or foreign baggage, express or freight; . . . .
>
> ". . .Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . ."
>
> * * *
>
> ". . .Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Amendment Six of the United States Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Appellant submits that if the witness hallucinates

RULES INVOLVED

Rule 404(b) of the Federal Rules of Evidence states:

"(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 611(b) of the Federal Rules of Evidence states:

"(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

QUESTIONS PRESENTED

1. Whether the trial and sentencing procedure in this case were conducted in such an egregiously unfair manner as to have deprived Appellant of his constitutional right to due process?

2. Whether it was error under the circumstances of this case for the trial court to have permitted a joint trial of Appellant and his co-defendant wherein evidence of other similar acts was admitted as to the co-defendant and that

evidence was highly and unfairly prejudicial to Appellant?

3. Whether Appellant was denied his constitutional right to confront a witness against him?

4. Whether the sentence in this case was based upon improperly considered facts.

5. Whether the trial court erred in foreclosing cross-examination of a Government witness concerning a conversation with Appellant where the fact of that conversation had been elicited on the witness' direct testimony?

6. Whether, with regard to the cross-examination of Appellant, it was error to allow extrinsic proof of a collateral matter?

PREFATORY NOTE

Appellant's broadest attack in this appeal is that the entire process by which he was convicted and sentenced to two years in prison was so tainted by error as to deprive him of due process of law. This very serious allegation is made, of course, in the context of this case. Appellant submits that his assignment of errors should be considered with recognition

that the Government's case against him was not overwhelming. The error which is alleged to have occurred in this case, therefore, could have been the "weight that tipped the scales" against Appellant.[4/] Krulewitch v. United States, 336 U.S. 440, 445 (1949); United States v. Mariani, --- F.2d --- (2nd Cir., July 19th, 1976), sl.op. p.5045, 5061.

Essentially, the Government had a one-witness case against Rosenwasser. This witness, Paul Fleischer, was a convicted felon who admitted to stealing on approximately four to five hundred occasions. (T 37 - 44) Indeed, cross-examination revealed that Fleischer had the temerity to hijack trucks even after he began to cooperate with the Government.

> "Q Am I correct that you commenced your cooperation, if I understand you correctly, in June of 1972 with the government?
>
> A Yes.
>
> Q When between June of 1972 and March of 1975 did you engage in hijacking?
>
> A I hijacked two trucks in between." (T 135)

[4/] There is no claim that the evidence was legally insufficient. United States v. Taylor, 464 F.2d 240 (2nd Cir., 1972).

Witnesses with aberrant behavior patterns do not always produce a weak case; e.g., United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974). However, in the instant case, the facts and circumstances surrounding Fleischer's testimony do absolutely nothing to bolster the witness' testimony. Indeed, the reverse is true.

As noted above, Fleischer began cooperating with the Government in June of 1972. (T 132) The indictment in this case was filed on April 8th, 1975. It is significiantly curious that the F.B.I. did not visit Rosenwasser' garment factory until March of 1975, some three years after the alleged possession of stolen goods. It will be remembered that Agent Redman recovered a portion of the stolen shipment from Braverman's house in June of 1974. (A 23) This seizure was apparently the result of information supplied by Fleischer. Yet at this time there was absolutely no attempt made to find the merchandise at Rosenwasser's factory. (A 24)

Moreover, it was established either by testimony or stipulation that not one of Rosenwasser's employees could recall any of the events described by Fleischer, who was quite specific in reporting the extent of work involved in delivering this huge load to Rosenwasser's place of business. (T 93 - 99)

Once the hijackers allegedly learned that Rosenwasser would not purchase the goods, tempers flared.

"A An argument broke out between Peters and Rosenwasser.

Q What did Charlie Peters say?

A Peters yelled out, 'I'll kill that Jew bastard if you don't take the load.' " (T 101)

Sometime later, the hijackers allegedly returned and took the remaining two-thirds of the goods which were bound for the new buyer, Braverman. (T 116 - 119)

It is strange indeed that absolutely no one who worked in this factory observed any of these events. (T 351 - 353, 377 - 378) For example, Fannie Extract, a sewing machine operator, gave the following testimony:

"Q Are you familiar, Mrs. Extract, with the men who deliver merchandise to the factory?

A They are coming in for years. I know them in and out.

Q Are you familiar with the men who take out the finished products?

A The same people.

Q On March 6th, 1972, did you anything unusual happen at the factory?

A Nothing else, like every single day." (T 379)

In addition, and as previously noted, there were serious inconsistencies between Fleischer's description of Rosenwasser's loft and the manner in which it actually appeared.

It is against this background, a case which can best be described as marginal, that this Court is asked to review Appellant's allegations of error. As required by the rules of this Court, each of the arguments below will be divided by appropriate headings. In this case, it is particularly appropriate to consider the separation of arguments as a matter of form rather than substance. Appellant respectfully asks that all points raised be considered together in evaluating the fairness of this trial. The aggregate effect of this error, it is submitted, requires the granting of a new trial.

POINT I

THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AGAINST CO-DEFENDANT ALLICINO WAS, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, ERRONEOUS; FAILURE TO EXCLUDE THIS EVIDENCE OR GRANT A SEVERANCE REQUIRES REVERSAL.

Seymour Rosenwasser and Gerald Allicino were alleged to be partners in crime. They were charged together in Count

Two of the indictment as co-conspirators.[5/] The Government would have it that during this entire episode from the hijacking to the final disposition of the goods, Rosenwasser and Allicino were as close as peas in the proverbial pod.

Prior to trial, the defense attorneys were apparently on notice that the Government intended to introduce evidence of another crime committed by Allicino which bore closely on the issue before the jury. It appears from the record that Allicino had pleaded guilty to a misdemeanor offense under Title 18, United States Code, Section 659, for the unlawful possession of stolen liquor on March 28th, 1972. (T 337 - 338) Prior to this trial, counsel for Appellant Rosenwasser noted that he had moved for a severance or exclusion of this proof at a joint trial.

> "MR. WALLACH: Your Honor, I don't want to be troublesome. We made an objection and moved for a severance because of the subsequent acts attributed to the other

---

5/ It is easily understood why Rosenwasser was acquitted of the conspiracy charge. The evidence, taken in the light most favorable to the Government, revealed that Rosenwasser did not enter into any agreement to purchase stolen goods prior to March 6th, 1972. Fleischer testified that Rosenwasser balked when the goods were first brought to his premises and evidenced no prior understanding or agreement. (T 101)

> defendant, do I have to renew when he opens to the jury and refers to it or could the record show that we brought it to your attention?" (A 9)

The Court then promised a limiting instruction and ultimately fulfilled that promise. (A 9, T 19 - 20, 310)

Nothing is more settled in this Circuit than that "evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show a defendant's criminal character or disposition." United States v. Deaton, 381 F.2d 114, 117 (2nd Cir., 1967); United States v. Brettholz, 485 F.2d 483, 487 (2nd Cir., 1973); United States v. Torres, 519 F.2d 723, 727 (2nd Cir., 1975); United States v. Papadakis, 510 F.2d 287, 294 (2nd Cir., 1975); United States v. Gerry, 515 F.2d 130, 140-41 (2nd Cir., 1975); Federal Rules of Evidence, Rule 404(b). This rule also applies where the evidence is to be admitted as to one defendant at a multi-defendant trial when appropriate limiting instructions are given. See, e.g., United States v. Payden, --- F.2d --- (2nd Cir., June 8th, 1976), sl.op. p.4053.

The introduction of such evidence requires a balancing of interests with the critical question being whether the probative value of the evidence is outweighed by the prejudice

caused by such evidence.

> "Even if the court finds that the proffered evidence of other crimes has probative value in proving something other than defendant's propensity to commit the charged crime, admission of the evidence does not follow as a matter of course. Rule 404 provides only that the evidence may be admissible. The committee notes that:
>
> No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweights the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403(a).
>
> In each case, the court must weigh the probative value of the proffered item against the harmful consequence specified in Rule 403 that might flow from its admission. See, Discussion of Rule 402."

Volume II, Weinstein's Evidence, Section 404[10], p.404-66.

Appellant recognizes that the trial judge has wide discretion to resolve the conflicting interests noted above. United States v. Montalvo, 271 F.2d 922, 927 (2nd Cir., 1959). Appellant also recognizes that the trial court's determination is rarely disturbed on appeal. However, if there was ever a case where the admission of a similar act against one defendant prejudiced the trial of a co-defendant against whom that evidence was specifically not admitted, this is that case.

Ernest Haridopolos, an F.B.I. Special Agent, testified

that on March 28th, 1972, he was investigating the theft of some stolen liquor which had been shipped in interstate commerce. (A 31) Defendant Allicino was observed driving a van which was transporting the stolen goods. (A 33) The van was followed to the same building on Pacific Street in Brooklyn where Appellant Rosenwasser rented space. (A 35 - 36)

Later observations disclosed that stolen liquor was located "in a little room just inside the doorway of this building." (A 37) It should be emphasized that this was <u>not</u> part of the space leased by Rosenwasser. It should be remembered that Rosenwasser was not Gerald Allicino's only nexus to this building. His brother worked there as the elevator operator. As previously noted, at the time this evidence was introduced, the trial court gave the jury another limiting instruction.

> "THE COURT: Ladies and gentlemen, you remember after the opening statement I cautioned you that a portion of the Government's evidence would be only admissible against Mr. Allicino, and this apparently pertains to that portion of the evidence, and secondly, that it would only be introduced for the purpose of showing knowledge or intent in the commission of the crime charged in the indictment, and for that purpose only. I will give you four instructions on the law in this question in my charge. But, bear in mind this does not go to prove the crime charged in the indictment. It only, if you find the facts with respect to this portion of the case to be

established, it only goes in on the question of knowledge and intent. It doesn't go in as proof to establish the crime charged in the indictment, in and of itself." (A 34)

Again, in the Court's charge, it was stated that:

"Now, there was proof in this case which was admitted solely - I should say there was evidence in this case admitted solely against the defendant Allicino, namely the possession of recently stolen liquor, knowing the same to have been stolen some time shortly after the events alleged in this indictment." (A 158 - 159)

Only if we are to engage in some bold fantasy can we conclude that the jury did not consider this proof against Appellant Rosenwasser. Bruton v. United States, 391 U.S. 123 (1968). The thrust of the Government's case was that Rosenwasser and Allicino were partners in crime and co-conspirators in the receipt of stolen goods. This is not a case where evidence of another crime was admitted which was totally divorced or severable from the co-defendant. Here, the connection between Rosenwasser and Allicino was so strong that it was simply unreasonable for the jury to have considered this subsequent similar act against Allicino but not Rosenwasser. It is clear from this record that this stolen whisky episode could not have been admitted if Rosenwasser had been tried separately. By a joint trial where this proof was admitted, the Government

unfairly gained a stronger case against Appellant.

Perhaps in another case, or under other circumstances, this claim that the trial court abused its discretion in allowing this evidence to be introduced at a joint trial, would not rise to the level of reversible error. But as noted at the outset, each of Appellant's arguments should be considered in conjunction with the others. In this vein, we turn to the next allegation of error which is inextricably a part of the point raised herein.

POINT II

REFUSAL OF THE TRIAL COURT TO ALLOW APPELLANT'S COUNSEL TO CROSS-EXAMINE AGENT HARIDOPOLOS WAS A DENIAL OF ROSENWASSER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

What Appellant Rosenwasser has asserted above is that despite the good intentioned instructions of the trial court, the evidence of a subsequent similar act was considered against Seymour Rosenwasser. Accordingly, Ernest Haridopolos of the F.B.I. was a witness "against" Rosenwasser when he testified as to the stolen liquor. (A 30 - 37)

It has been established beyond cavil that the right of cross-examination is a fundamental one, embodied in the Sixth Amendment to the United States Constitution as the right

of an accused to confront the witnesses against him. Davis v. Alaska, 415 U.S. 308 (1974); Pointer v. State of Texas, 380 U.S. 400 (1964); Smith v. Illinois, 390 U.S. 129 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Chambers v. Mississippi, 410 U.S. 284 (1973). No doubt the extent of cross-examination is a matter within the trial court's discretion. United States v. Jenkins, 510 F.2d 494 (2nd Cir., 1974); United States v. Evanchik, 413 F.2d 950 (2nd Cir., 1969). However, reversal is clearly required where the right of cross-examination is denied. J.E. Hanger, Inc. v. United States, 160 F.2d 8 (D.C. Cir., 1947); United States v. Zambrano, 421 F.2d 761 (3rd Cir., 1970).

At the conclusion of Agent Haridopolos' direct testimony and after co-counsel briefly cross-examined (T 318 - 319), trial counsel for Appellant Rosenwasser attempted to cross-examine the witness. The attempt was futile. (A 43 - 44)

"Q Mr. Haridopolos -

MR. LEVIN-EPSTEIN: Your Honor, may we approach the sidebar. I am going to object before even one question is asked. May we approach the sidebar?

THE COURT: Yes. (Whereupon a sidebar discussion was held).

MR. LEVIN-EPSTEIN: I am objecting to any cross-examination by the defendant Rosenwasser and ask that the jury be instructed that none of this

evidence comes in against him.

MR. PELUSO: Well, judge, pictures were admitted into evidence, there is definitely a spillover as to my client.

I thing I should at least be allowed to point out where the place is located. Also, we have had very ambiguous language that was brought out.

THE COURT: What is the church?

MR. PELUSO: That is part of the description of the area.

THE COURT: That's different.

MR. PELUSO: In addition to that language being ambiguous as to the address at 2395 Pacific Street, now the impression can be -

THE COURT: No. It's not admitted against him.

MR. PELUSO: I think I should make it clear to the jury.

THE COURT: I have made it clear to the jury. You can call him as your own witness. You can instruct him to remain and put him on the witness stand, if you wish." (A 43 - 44) 6/

6/ Following the Court's ruling, the Government equivocated somewhat on its position that cross-examination would be improper. (A 44 - 45) Apparently, this equivocation was coupled with a threat that "the door will be open" for further inquiry which might prove harmful to defend them. This statement appears on the record as a complete non sequitor and does not reflect the position of the trial court. (A 44) Trial counsel made it clear that he was not examining because of the ruling received from the court. "MR. PELUSO: Thank you. I will abide by your Honor's ruling, and I will not examine, subject to your Honor's rule. (A 44)

Appellant submits that if the witness Haridopolos arguably was a witness against him, he should have been allowed to cross-examine. From the argument lodged in Point I of this brief, it is clear that under any analysis there is an arguable basis on which to conclude that Haridopolos was testifying against Rosenwasser. Even if that possibility could be characterized as remote, counsel should have been allowed the opportunity to cross-examine. It is here submitted, however, as it was submitted in Point I of this brief, that the possibility of the jury utilizing this evidence against Rosenwasser was a very real one. It is submitted, therefore, that it was clear and reversible error of constitutional magnitude to prevent Appellant's trial counsel from conducting his cross-examination especially where the purpose of that cross-examination was both apparent and placed on the record.

It may be expected that the Government will attempt to absolve the error by reliance upon the fact that the trial court invited counsel to call Haridopolos as a defense witness. (A 43) In United States v. Zambrano, supra, the trial court made an identical invitation which did not serve to salvage the conviction. Simply stated, there was no obligation for Appellant's counsel to call the agent on the defense case. On the other hand, there was a constitutional requirement that

Rosenwasser's counsel be permitted the opportunity to cross-examine.

One case decided by the Fifth Circuit Court of Appeals, while not actually on point, is helpful to an analysis of the issue at hand. In United States v. Pollard, 509 F.2d 601 (5th Cir., 1975), three men, including Appellants Hermand and Pollard, were convicted of a bank robbery in Atlanta, Georgia. Testimony at trial established that Pollard had confessed to other subsequent bank robberies, i.e., similar acts, in California. Appellant Herman claimed that he was denied his Sixth Amendment right to confront a witness against him since he was unable to cross-examine Pollard as to the other offenses. Herman relied upon the Supreme Court's decision in Bruton v. United States, supra. The Fifth Circuit held that:

> "The point is not well taken, since Bruton concerned the admission into evidence of the confession of one Evans implicating his co-defendant Bruton, denying to Bruton the right of confronting and cross-examining Evans. Here, Pollard in no way implicated Herman in the California offenses and ample cautionary instructions by the trial judge protected Herman." 509 F.2d at 604

The instant case is immediately distinguishable. The co-defendant's "subsequent similar act" was neither geographically or temperally distinguishable. In Pollard, the jury could reasonably have been expected to follow a limiting

instruction which directed that this proof only be considered against defendant Pollard. Furthermore, Appellant Rosenwasser makes no claim of error on the basis of the fact that Allicino did not testify and thus, was not available for cross-examination. Bruton v. United States, supra. Here, Appellant simply wanted to cross-examine an available witness whose direct testimony pragmatically cast a cloak of suspicion on him. Even though Haridopolos' testimony focused on Gerald Allicino, a shadow fell upon Rosenwasser. Rosenwasser's counsel, it is submitted, was duty-bound to attempt to remove that shadow. Failure to allow him to do so was reversible error.

POINT III

THE SENTENCING PROCESS IN THIS CASE WAS EGREGIOUSLY UNFAIR; IN THE EVENT THAT THIS CONVICTION IS AFFIRMED, THE CASE SHOULD BE REMANDED FOR RE-SENTENCING BY ANOTHER JUDGE.

The Government may respond to the arguments raised in Points I and II of this brief by urging that the trial court, on at least three occasions, instructed the jury that the testimony pertaining to stolen liquor was only admissible as to defendant Allicino and, therefore, the introduction of this testimony could not be found harmful to Appellant Rosenwasser. Any such claim, it is submitted, is foreclosed by an analysis of the sentencing process in this case.

As a result of this conviction, Seymour Rosenwasser was sentenced to two years imprisonment. Appellant is aware that under ordinary circumstances, this Court does not review a legal sentence which is within the trial court's discretion. United States v. Del Toro, 513 F.2d 656 (2nd Cir., 1975). However, where the procedure by which sentence is determined is inherently unfair, this Court has demonstrated that it will not hesitate to act. United States v. Rosner, 485 F.2d 1213 (2nd Cir., 1973).

It appears that after sentence was imposed in this case, the Appellant's wife, Mrs. Marilyn Rosenwasser, wrote a letter to Judge Platt asking why such a harsh sentence had been imposed.[7/] This letter was apparently referred by Judge Platt to the United States Department of Probation which attempted to provide the rationale for the imposition of the prison term. This letter is reproduced in Appellant's Appendix at page 201. Most worthy of note is the letter's third paragraph which reads:

> "With respect to Allicino, a six month sentence was imposed which he will have to serve in full. This sentence was

---

7/ Seymour Rosenwasser is 56 years old and has never previously been convicted of a crime. (A 46 - 47)

> decided upon by the Court because Allicino has already served a four-month sentence on a similar offense committed at just about the same time that he acted as middleman in the offense involving your husband. When Allicino was arrested on the other offense, he was unloading stolen cases of whisky at your husband's place of business. No charges were placed against your husband for that offense. 8/ (A 201, Emphasis supplied)

This assertion can only be described as the unkindest cut of all. A criminal justice system which seeks to establish confidence in all, criminal defendants as well, that the disposition of criminal cases is guided by the constitutional right to due process, must be affected when rudimentary notions of fairness are ignored.

Seymour Rosenwasser witnessed the trial court's ruling that he could receive a fair trial despite the introduction of a subsequent similar act committed by defendant Allicino. Seymour Rosenwasser also witnessed the trial court's intructions, on some three occasions, to the effect that these similar acts were not introduced against him. Seymour Rosenwasser further witnessed the trial court prevent his attorney from cross-

---

8/ This analysis of the Allicino sentence is supported by the Allicino sentencing minutes. (A 179)

examining F.B.I. Agent Haridopolos on the subject of stolen liquor allegedly brought to the building where he conducted his business. Then, at what was undoubtedly the most important stage of the prosecution as far as he was concerned, Seymour Rosenwasser received a sentence of two years on the apparent notion that this sentence reflected consideration of his participation in that very same stolen liquor transaction.

The jury who tried the facts of this case was expected to separate the stolen whisky episode from Appellant Rosenwasser. Apparently, the trial court, who furnished the limiting instructions, and the Probation Department were unable to draw this important distinction. How can it be expected that the jury would be able to make this distinction? And, further, if the distinction is that difficult, how can it be found that failure to allow cross-examination of Agent Haridopolos did not result in a denial of Appellant's Sixth Amendment right to confront a witness against him? These questions are meant to be rhetorical. It is clear that this evidence of Allicino's subsequent similar act unfairly strengthened the Government's case against Rosenwasser. It is equally clear that both the jury and the court relied heavily on this evidence during their respective participation in the disposition of this case. For

these reasons, it is submitted, should the conviction stand thenat the very least, this sentence cannot stand.

POINT IV

FAILURE TO ALLOW CROSS-EXAMINATION ON A VITALLY IMPORTANT POINT WHICH WAS THE SUBJECT OF A PROSECUTION WITNESS' DIRECT TESTIMONY WAS REVERSIBLE ERROR.

Appellant Rosenwasser again emphasizes that each of the points raised in this appeal should be considered with each other and that the cumulation of error requires reversal. There are two remaining points to be raised in this brief. Each of these points, it is submitted, gain their true significance when considered with the other points raised and when considered against Appellant's initial proposition that this was a close case. What in other cases may constitute error which is harmless beyond a reasonable doubt, cannot be dismissed or disregarded on the facts of this case.

Richard Redman of the F.B.I., who was assigned the role of case agent in this matter (T 287), testified that on March 14th, 1975, he met with Appellant Seymour Rosenwasser during the course of this investigation.

"Q Now, in your capacity as case officer, Agent Redman, directing your attention to March 14, 1975, when you met with the defendant, Seymour Rosenwasser -

A Yes.

Q Was that meeting part of your official investigation?

A Yes.

Q Would you tell the jury, please, where you met with him?

A At the factory located at 2395 Pacific Street.

Q Where is that?

A In Brooklyn, New York.

Q Did you have a conversation with him?

A Yes.

MR. LEVIN-EPSTEIN: I have no further questions." (A 21 - 22)

Here, again, Appellant's trial counsel attempted to cross-examine the agent with regard to the conversation which he testified that he had with Rosenwasser on March 14th, 1975. (T 24 - 25) The trial court prevented this cross-examination and reasoned that:

"You can't put your defense in through the agent." (A 26)

Counsel then complained that the Government attorney had opened

the door to examination on this point and further contended that to leave the fact of a conversation dangling in front of the jury might pave the way for adverse inference to be drawn.

> "MR. WALLACH: Your Honor, the last question as I recollect of the prosecutor was, 'Did you have a conversation with Mr. Rosenwasser?' That was it. He never asked him what he said. That can leave an impression with the jury that the defendant said something, may have availed himself with the Fifth Amendment or something about consciousness of guilt." (A 25)

Appellant submits that it was error to foreclose cross-examination where the Government attorney covered the subject on direct examination. Federal Rules of Evidence, Rule 611(b); Brown v. United States, 356 U.S. 948 (1958).

In United States v. Williams, 478 F.2d 369 (4th Cir., 1973), the Government called Leonard Dahl, an F.B.I. agent, as a witness against defendant Williams. Dahl testified to portions of a conversation that he had with Williams.

> "Then, on cross-examination, Williams' counsel asked Dahl to read the rest of his notes as to the content of the conversation. The prosecutor objected and the court sustained the objection, refusing to allow any part of the notes to be read except that which may have touched on the questions asked on direct examination." 478 F.2d at 372

The Court of Appeals held that this denial of cross-examination was error and reversed Williams' conviction.

The Government will undoubtedly argue that since just the fact of the conversation was elicited rather than its content, there was no right to cross-examination. However, such an argument cannot withstand rational analysis. The jury in the instant case was allowed to consider, for whatever evidentiary value it might have, that there had been a conversation between the F.B.I. agent and Rosenwasser. Without learning more, the jury may well have speculated as to the content of that conversation. Common knowledge regarding the right to remain silent may have influenced the jury's consideration of the matter. It would, of course, have been improper if the jury had been given the opportunity to reason that Rosenwasser had remained silent at the time of the interview. Doyle v. Ohio, --- U.S. --- (June 17th, 1976); Henderson v. Morgan, --- U.S. --- (June 17th, 1976).

In Banning v. United States, 130 F.2d 330, 338 (6th Cir., 1942), Judge Hamilton stated that:

> "It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party

> he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of direct examination."

Here, the prosecutor undoubtedly elicited the fact of this conversation because he believed it to be beneficial to his case. Appellant's trial counsel, with the door now wide open, had not only the right, but the duty to fully explore this matter on cross-examination.

POINT V

THE GOVERNMENT'S PROOF OF A COLLATERAL MATTER BY EXTRINSIC EVIDENCE WAS ERROR.

As developed earlier, Appellant Rosenwasser testified in his own behalf. (A 46) Government counsel, in cross-examining Rosenwasser, sought to emphasize the close relationship between Rosenwasser and Allicino.

"Q Mr. Allicino ever work for you?

A Yes.

Q In what capacity?

A A presser.

Q How long did Mr. Allicino work for you as a presser?

A He worked about twenty some odd years ago, maybe for a year or two, I don't know.

Q Approximately when did he work?

A I told him about 20 years ago." (A 78)

The prosecutor then attempted to impeach the defendant-witness on the collateral matter of when Allicino worked for him and what amounts he paid. (A 78 - 92)

The prosecutor began his impeachment efforts by asking:

"Q Isn't it a fact, Mr. Rosenwasser, that Mr. Allicino has worked for you on other occasions?

A No.

Q It's not a fact?

A No." (A 80)

Attempting to refresh the witness' recollection, the prosecutor later asked:

"Q Mr. Rosenwasser, isn't it a fact, sir, that on January 31st of 1972 you told somebody that Mr. Allicino had worked for you from 1957 right up through and including January 31, 1972; isn't that a fact, sir?" (A 92)

The Government attorney again attempted to refresh the witness' recollection by showing him what was marked as Government's

Exhibit 22, a letter to the First National City Bank which read:

> "Dated January 31st, 1972. 'National City Bank. Gerald Allicino has been in my employ since 1967 and is now earning a salary of $250 per week. Thank you.' And signed Seymour Rosenwasser." (A 97)

This document was admitted over defense objection. (A 95 - 96)

Later, the Government attorney asked the question:

> "Q Mr. Rosenwasser, is it your testimony that you had no contact with the First National City Bank with respect to a loan transaction concerning Mr. Allicino?" (A 115)

Shortly after this question was asked, a sidebar conference was held where the prospect of a rebuttal case was discussed. (A 116)

> "MR. LEVIN-EPSTEIN: In the interest of expediting this matter the government would like to put in a rebuttal case and to that end I would ask, and I'm sure Mr. Newman will join with me, a court instruction to the jury that the last question of Mr. Rosenwasser with respect to loan transaction is not to be considered against either party; is that a fair statement?
>
> MR. NEWMAN: Why not just strike the question and answer.
>
> MR. LEVIN-EPSTEIN: I represent to the court if put to the test I could call in the bank officer <u>but I think its a collateral matter</u>." (A 116 - 117, emphasis supplied)

Following this exchange, Rosenwasser's trial counsel moved for a mistrial on the basis of the introduction of this evidence. Counsel stated that:

> "Your Honor, this to a jury of layment, this may become the case instead of what Mr. Fleischer said as opposed to my client." (A 121)

Plainly stated, this document, which was described by the Court as both collateral[9/] and important to the Government's case,[10/] should not have been admitted into evidence.

It is submitted herein that under the applicable principles of law, this exhibit should not have received the attention it did.

9/ "THE COURT: It's collateral in the sense I will instruct the jury it has been introduced for impeachment purposes only, and this is not to be taken as evidence in chief, but that is the purpose for which it was offered under credibility of the witness." (A 122)

10/ "THE COURT: In this case it's terribly important." (A 122)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction herein should be reversed and the matter remanded to the District Court for a new trial.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant

GERALD L. SHARGEI
Of Counsel

Service of ~~three~~ Two (2) ③ copies of the within
is admitted this 2nd day of August 1976

R. De Mallis
United States Attorney for the Eastern District

RECEIVED
U.S. ATTORNEY
AUG 2 1 33 PM '76
EAST. DIST. N.Y.